IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 517 OF 1989

(1) Bhagchand Punamchand Dhoka,
age 58 years, occupation
trader, resident of
Akulgaon, Taluka Madha,
District Solapur

(2) Khushalchand Punamchand Dhoka,
Occupation trader,
Resident of Kurduwadi,
Taluka Madha,Dist.Solapur. **... Appellants**
(**Orig. Defendants**)

Versus

Vijaykumar Raoji Shah,
age 60 years occupation trader,
resident of Kurduwadi,
Taluka Madha,
District Solapur. **... Respondent**
(**Orig. Plaintiff**)

Mr. Parag Shelke with Mr. A.A. Kumbhakoni, Advocate for Appellant
Mr. Surel S. Shah Advocate for Respondent

CORAM : ***S.R.SATHE,J.***
DATED : ***13th JULY, 2006***

ORAL JUDGEMENT :-

1. Appellants the original defendants in Regular Civil Suit No.157 of 1980 have preferred this appeal against the judgement and order passed by the Court of 4th Additional District Judge, Solapur in Civil Appeal No.546 of 1985, whereby appeal was partly allowed and the order passed by the Trial Court dismissing the Plaintiff's suit was set

aside and Plaintiff's claim for declaration was allowed and it was held that the defendants have not acquired easementary right to have the access of light and air through disputed four windows. However, Plaintiff's claim for mandatory injunction was rejected. For the sake of convenience hereafter the parties shall be referred to as *'Plaintiff'* and *'Defendants'*.

2. The brief facts giving rise to this appeal are as under :-

The property bearing City Survey No.170(A) described in detail in paragraph No.1 of the plaint is owned by Plaintiff. The property bearing City Survey No.171 described in detail in paragraph No.2 of the plaint is situated to north of Plaintiff's property and is purchased by defendant No.1 from Raoji Manikchand Gandhi and Gulabchand Manikchand Gandhi. The defendant No.2 is residing in the said property. According to Plaintiff, in the southern wall on defendants' property, there are three windows. However, defendants have no right to take light and air through the said windows. In fact, with a view that the defendants should not get light and air through the said windows and they should not claim such right, the Plaintiff constructed a shed in front of the said windows. Naturally, the defendants could not acquire any easementary right to take light and air through the said windows. The

Plaintiff also prevented the defendants from taking light and air through one particular window which was not covered by the shade. He therefore, put up one iron sheet in his property in front of the window in such a manner so as to obstruct the light and air. In fact, plaintiff's predecessor in title had also taken care to see that the defendants do not acquire any such right. However, on 29/09/1977 the defendants submitted an application to Kurduwadi Municipal Council and requested them that they should ask the Plaintiff to remove his shade and the obstruction created by him by putting iron sheet. Accordingly, Kurduwadi Municipal Council even issued notice to Plaintiff. Plaintiff gave reply to the same and informed that he would not remove the shed or the obstruction and the defendants are not having any right to take light and air through the windows which are opened in the southern wall of defendant's property, which is adjoining to plaintiff's property. The Municipal Council therefore did not take any action against the Plaintiff. However, in the year 1980, Kurduwadi Municipal Council issued another notice. The same was also replied by the Plaintiff.

3. It is Plaintiff's case that when the defendants attempted to get the shed and obstruction removed through municipal council and gave threat to Plaintiff that they

would get the obstructions and shed removed, Plaintiff filed Regular Civil Suit No.157 of 1980 on 12/08/1980 for declaration that the defendants are not having any easementary right to take light and air through four windows kept in the southern wall of his property and for permanent injunction restraining the defendant from removing the Plaintiff's shed as well as the iron sheet fixed by them against the windows in the southern wall. The Plaintiff also alleged that the defendants have also kept one window in the southern wall of first floor but the defendants have no right to take light and air through the said windows also and the defendant can not obstruct the plaintiff from erecting iron sheet against the said windows. The plaintiff also claimed for mandatory injunction directing the defendants to close the window (fourth window) which is opened at a height of 18 feet i.e. in the southern wall of the first floor of his property.

4. The defendant Nos. 1 and 2 filed their joint Written Statement at Exh-15 and admitted that to the south of their property, there is property of the Plaintiff. They, however, contended that they purchased the said property in the year 1950 and the windows in question were in existence even at that time. Not only that but since the time they purchased the property, they were taking light and air through the said windows and neither Plaintiff nor

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anyone else had created any obstructions in taking the said light and air and thus, they have acquired easementary right to take light and air through the windows in question.

5. The defendants further denied the Plaintiff's allegations that the defendants instigated the municipal council to issue notice to Plaintiff. According to them, when they were out of station, the Plaintiff unauthorizedly constructed iron shed in his property and thereby obstructed the defendant's right to take light and air through one window. As the shed was unauthorized, the municipal council issued a notice. The defendants further contended that Plaintiff had no right to put up any iron sheet against the windows and obstruct the easementary rights of the defendants to take light and air. Hence, on all these grounds, the defendants prayed for the dismissal of the suit.

6. On these pleadings, the learned Trial Judge framed issues at Exh-16. In order to prove the suit claim, the Plaintiff examined himself at Exh-39 and three other witnesses. As against this, the defendant examined himself at Exh-44 and two other witnesses. Both the parties produced certain documents. During the pendency of the suit, the Commissioner was also appointed and after

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visiting the suit site, he submitted his report at Exh-23.

7. After considering the evidence adduced by both the parties, the learned Trial Judge held that the windows in question were in existence for more than 30 years and when the said windows were kept in southern wall, the property of the Plaintiff was not at all constructed but it was open plot. The defendants had a right to construct a building in their own property and to keep windows in the southern side wall and thereby take light and air through the said windows and plaintiff had no right to close the said windows by putting the tin sheet against the said windows. The learned Trial Judge also held that Plaintiff has failed to prove that defendants tried to remove the shed erected by him in his own property. The learned Trial Judge therefore, dismissed the Plaintiff's suit.

8. Being aggrieved by the said judgement and order, the Plaintiff filed First Appeal No.546 of 1985. After hearing the arguments of both the learned advocates, the learned First Appellate Judge came to the conclusion that Plaintiff has proved that defendants have not acquired easementary rights to have light and air through disputed four windows in the southern wall of defendant's property. He therefore, granted declaration as prayed in favour of Plaintiff. After setting aside the order passed by the

Trial Court, the learned First Appellate Judge, however held that the Plaintiff has failed to prove that he is entitled for mandatory injunction directing the defendants to close the window opened in the southern wall at height of 18 feet i.e. in the first floor wall. He therefore, rejected the plaintiff's claim regarding permanent and mandatory injunction in that behalf.

9. As It was held that defendants have not acquired easementary rights, the defendants challenged the above mentioned order in this Second Appeal.

10. From the perusal of the record, it appears that while admitting the appeal on 06/10/1989 this Court has passed the following order.

> *" Appeal admitted. The two substantial questions of law being:-*
> *(i) whether the suit as framed was maintainable in law to any extent ?*
> *(ii) Whether the declaration given by the Appellate Court is proper ? "*

11. In this appeal before me, the learned advocate for the defendants has urged only two points. Firstly, he submitted that the learned First Appellate Judge has not properly appreciated the evidence on record and has wrongly

given importance to the Sale Deed executed by the defendant's vendor though the same was not exhibited and admitted in evidence by the Trial Court. Secondly, he canvassed before me that the learned First Appellate Judge should not have considered the evidence with regard to agreement between Plaintiff's predecessor in title and the defendants. He therefore submitted that the Plaintiff has in fact failed to prove that the defendants have no right to take light and air through the windows in question. He further submitted that the appeal be allowed and the Plaintiff's suit be dismissed. As against this, the learned advocate for the Plaintiff supported the judgement and order passed by the First Appellate Court.

12. It is not in dispute that the property described in para-1 of the plaint is owned by the Plaintiff and to the north of the said property, there is a property of defendant which they have purchased from Gulabchand Manikchand Gandhi in the year 1950. It is also admitted that when defendants purchased the property, the house in question and not only that but the southern wall in question and windows therein were in existence. It is Plaintiff's case that since the said windows were opened, objection was taken by plaintiff's predecessor in title and thereafter by Plaintiff and with a view that the defendants should not be able to take light and air through three

windows in question situated in the southern wall, the Plaintiffs constructed one shed and other cattle shed and as a result of the same three windows in question were closed. As against this, it is the contention of the defendants that the shed is constructed by the Plaintiff some time in the year 1977 so as to obstruct the defendant's right to take light and air. But according to them as the windows in question were in existence since the year 1950, they had already acquired easementary right to take light and air through the said windows.

13. In order to find out whether the defendants had in fact acquired any easementary rights to take light and air through windows in question, it is necessary to see the evidence of both the parties and find out whether the said windows were in fact open for statutory period i.e. for 20 years and the defendants were taking light and air through the said windows. While considering this point, the evidence of Plaintiff Vijaykumar Raoji Shah, and his three witnesses assumes importance. Plaintiff has categorically stated that as result of the cattle shed, windows in the southern wall have been closed and as a result of the godown, the other window is closed. The testimony of Plaintiff is corroborated on material point by Gulabchand Manikchand Gandhi Exh-40 who is in fact the vendor of defendant's property. The said witness has clearly stated

that he had no right to take light and air through the windows in question. When the defendant's vendor was not having such right, the question of defendants getting the said right under the Sale Deed does not arise. It is pertinent to note that there is no sufficient evidence on record to show that Gulabchand Manikchand Gandhi has deliberately joined hands with Plaintiff and now he is making such statement so as to help the plaintiff. In fact, the Sale Deed in question ought to have been admitted in evidence by the learned Trial Judge. It is true that it is not the original Sale Deed but it is photocopy of registered Sale Deed. The Plaintiff had issued notice to defendants to produce the original but the defendants did not produce it by saying that the same is not traceable. Naturally, under such circumstances, the Plaintiff was entitled to lead secondary evidence and accordingly photocopy of the Sale Deed has been produced by the Plaintiff and the same has been rightly considered and relied upon by the First Appellate Court.

14. Plaintiff has examined other two witnesses namely Kashinath Nivrutti Bhise Exh-41 and Nijam Abdul Mulani Exh-42. Both these witnesses have also supported the plaintiff's version and have stated that the shed in question is in existence since long. Nijam Mulani categorically stated that the shed and godown are in

existence for last 30 to 40 years. They are neighbours of the plaintiff. So naturally, they must have seen the property since long and as such there is no reason to disbelieve their testimony, particularly when the same is not shaken or shattered in the cross-examination.

15. It is important to note that even the defendant's witness Bhagchand Punamchand Dhoka has also admitted during the cross-examination that cattle shed is in existence since the beginning. Not only that but the other witness of the defendant namely Vishwanath Damodar Parakhe Exh-57 has also clearly admitted in cross-examination that Plaintiff's godown is in existence since last 30 to 40 years. So all this evidence goes to show that the contention of the defendants that Plaintiffs constructed the shed and godown for the first time in the year 1977 taking advantage of the situation that the defendants were out of town can not be accepted. On the contrary, it does appear that right from the beginning, plaintiff and his predecessor were cautious to see that the defendants do not keep any window on their side and acquire any easementary right to take light and air which in future would affect their right of constructing building or wall on that side.

16. There is another piece of evidence which would also go to show that it was made clear to the defendants that

defendants would not get any right to take light and air through the said windows and accordingly, agreement to that effect was executed. The said document is admittedly more than 30 years old and as such, the learned First Appellate Judge has rightly taken into consideration the same. So far as the Sale Deed is concerned, the vendor himself has proved the same. He has also spoken about the agreement so under such circumstances, it can not be said that the First Appellate Judge committed error in considering the certified copy of the Sale Deed and the agreement. Thus we find that evidence adduced by the Plaintiff was sufficient to show that though the defendant's house was in existence since the year 1950 and there were also windows in the southern wall of the said house, the Plaintiff who is having his property adjoining to the said southern wall had obstructed the defendants to take light and air through the said windows. So, it is amply clear that the defendants have in fact not acquired any easementary rights to take light and air through the 4 windows in question. In fact, admittedly, 4th window is constructed just few years prior to the filing of the suit. So question of acquiring any easementary rights in respect of that window had not arisen and even in respect of that window, the plaintiff erected two wooden pillars and fixed iron sheet on the same against the said windows. So the learned First Appellate Judge after considering the entire evidence correctly held that

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the defendants have no such right as contended by them.

17. It is pertinent to note that in the instant case, the plaintiff is in fact seeking a negative declaration. However, there is no such rule or law that negative declaration can not be granted in any circumstances. When it is established by the Plaintiff that defendant is doing or is likely to do any particular act alleging that he is having a particular right and when in fact it appears that he has no such right then with a view that Plaintiff's civil rights should not be affected in future, plaintiff is entitled to seek declaration in negative form as regards the status of defendants or their rights.

18. In this view of the matter there is not substance in this appeal. The appeal is dismissed with costs.

(S.R.SATHE,J)

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